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The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process

By ROBERT L. MISNER*

The Speedy Trial Act of 1974¹ (Act) endeavored to minimize delay in criminal proceedings by mandating that criminal defendants be tried within one hundred days after arrest or service of summons, excluding certain periods of delay.² Superficially, the Act resembles most state speedy trial statutes.³ In actuality, the Act is a major innovation in the field of criminal legislation because of its comprehensive planning provisions that are intended to facilitate the transition to a speedier criminal justice system.⁴ The Act as adopted in 1974 provided that time limits for indictment and trial of defendants were to be phased in during a four-year program.⁵ During the phase-in period, when sanctions for failure to comply with the Act's time limits were not fully applicable, the district courts were directed to experiment, critique, and plan compliance efforts. The district courts were organized into groups to gather data, comment on the substantive provisions of the Act, and determine the resources needed to comply with the mandated time requirements.⁶ In effect, Congress admitted that it needed the assistance of local federal judges, magistrates, lawyers, clerks, and

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1. 18 U.S.C. §§ 3161-3174 (1976 & Supp. III 1979).

2. *Id.* § 3161.

3. For a discussion of state speedy trial statutes, see Poulous & Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse*, 28 HASTINGS L.J. 357 (1976).

4. For a general description of the bill, see H.R. REP. NO. 1508, 93d Cong., 2d Sess. 21-28, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7401, 7414-21 [hereinafter cited as H.R. REP. NO. 1508].

5. 18 U.S.C. §§ 3165-3168 (1976).

6. *Id.*

probation officers in drafting a workable response to a serious problem.

During the phase-in period, however, the majority of district courts neglected their planning responsibilities and Congress ignored even those few suggestions that the district courts did advance.⁷ Congress' disregard of the planning provisions of the Act eventually led to the ill-advised amendments to the Speedy Trial Act that became effective on August 2, 1979.⁸

The purpose of this Article is to analyze the inadequacies of the three major 1979 amendments to the Act and to demonstrate that the inadequacies of these amendments result from the failure of Congress and the courts to make good faith efforts to implement the planning provisions of the Act. The Article first examines the substantive provisions of the Act as originally promulgated, noting the areas that were amended in 1979. The Article then analyzes the three major 1979 amendments, focusing on their impact on the planning process. The Article concludes that bypassing the district court planning groups may well sound the death knell for the planning process as envisioned by the drafters of the Act.

Provisions of the Act

The Speedy Trial Act of 1974 required that from July 1, 1975, to July 1, 1979, trials of all persons held in detention solely because they were awaiting trial had to commence no later than ninety days following the beginning of continuous detention.⁹ The amended Act continued these provisions through July 1, 1980. The interim limits relating to the in-custody defendant merely served to assure in-custody cases the highest priority in trial scheduling.¹⁰ If the in-custody defendant was not tried within ninety days, he or she was to be released.¹¹ After July 1, 1979, both the original and

7. See Misner, *District Court Compliance with the Speedy Trial Act of 1974*, 1977 ARIZ. ST. L.J. 1, 15-25.

8. Speedy Trial Act Amendments Act, Pub. L. No. 96-43, 93 Stat. 327 (1979) (codified in scattered sections of 18 U.S.C. (Supp. III 1979)).

9. 18 U.S.C. § 3164(b) (1976).

10. See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REVISED MODEL STATEMENT OF TIME LIMIT AND PROCEDURES FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES 2 (Speedy Trial Directive No. 11, Feb. 18, 1976).

11. 18 U.S.C. § 3164(c) (1976). Whether the computation of the 90-day period can take into account the excludable time provisions of § 3161(h) remains unresolved. The Administrative Conference has taken the position that the exclusions do not apply to the in-custody

amended versions of the Act mandate that criminal defendants be tried within one hundred days after arrest or service of summons, excluding certain limited periods of delay.¹² The amendments also retained the provisions of the Act establishing experimental service agencies¹³ to be governed by the Administrative Office of the United States Courts to provide support and supervisory services to noncustodial defendants awaiting trial.¹⁴

The original Act divided the maximum one hundred day period between arrest and trial into three segments: a thirty-day limit between arrest and the filing of an indictment or information,¹⁵ a ten-day limit between the filing of an indictment or information and arraignment,¹⁶ and a sixty-day limit between arraignment and trial.¹⁷ This division of the one hundred day period, however, was not to become effective until the fifth year after the passage of the Act; during the five year phase-in period, the time standard varied.¹⁸ The 1979 amendments retain the one hundred day limit but divide the one hundred days into only two periods: a thirty-day limit between arrest and the filing of an indictment or information,¹⁹ and a seventy-day limit between the filing of an indictment or information and trial.²⁰

defendant during the interim period. See *The Speedy Trial Act Amendments of 1979: Hearings Before the Senate Comm. on the Judiciary on S.961 & S.1028*, 96th Cong., 1st Sess. 290, 330 (1979) [hereinafter cited as *Senate Hearings 1979*]. The Justice Department has taken the contrary position. See *id.* at 700-01. In the first case dealing with the issue, the Ninth Circuit held that the excludable time provisions are not applicable to the in-custody defendant. *United States v. Tirasso*, 532 F.2d 1298 (9th Cir. 1976). Other courts, however, have not followed the Ninth Circuit's lead. See, e.g., *United States v. Corley*, 548 F.2d 1043 (D.C. Cir. 1976); *United States v. Mejias*, 417 F. Supp. 579 (S.D.N.Y.), *aff'd on other grounds sub nom.* *United States v. Martinez*, 538 F.2d 921 (2d Cir. 1976); *United States v. Masko*, 415 F. Supp. 1317 (W.D. Wis. 1976).

12. 18 U.S.C. § 3161 (1976 & Supp. III 1979).

13. The individual districts that have been chosen as experimental districts are: District of Maryland, Eastern District of Michigan, Western District of Missouri, Eastern District of New York, Eastern District of Pennsylvania, Central District of California, Northern District of Georgia, Northern District of Illinois, Southern District of New York, and Northern District of Texas. For a discussion of the pretrial service agencies, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974, at 25-44 (1976).

14. 18 U.S.C. §§ 3152-3155 (1976).

15. *Id.* § 3161(b) (1976).

16. *Id.* § 3161(c) (repealed 93 Stat. 327 (1979)).

17. *Id.*

18. *Id.* § 3161(f)-(g).

19. *Id.* § 3161(b).

20. *Id.* § 3161(c)(1) (Supp. III 1979).

Time periods can be tolled by the "excludable time" provisions of section 3161 (h), which somewhat mitigate the apparent stringency of the Act.²¹ The Act specifically excludes delay resulting from physical and mental examinations, trials on other charges, interlocutory appeals, hearings on pretrial motions, and Federal Rule of Criminal Procedure, 40 transfers, from the statutory time limits.²² The Act also recognizes other exclusions, such as delays owing to deferred prosecution to allow the defendant to demonstrate good behavior, the absence of defendants and witnesses, and other procedural difficulties.²³ The Act contains an escape clause that permits the court to delay the trial if, by granting the continuance, the ends of justice "outweigh the best interest of the public and the defendant in a speedy trial."²⁴ The possibility of using this exception to circumvent the operation of the Act forbids granting such a delay unless the court sets forth its reasons on the record for doing so.²⁵ The factors that the court must consider are: whether a miscarriage of justice would likely result if the continuance were not granted; whether the nature of the case is such that adequate preparation cannot be expected within the statutory time limits; and whether the delay is caused by the complexity of the case before the grand jury.²⁶ The Act specifically states, however, that general court congestion, lack of diligent preparation by the government, or failure of the government to obtain an available witness are not grounds for delay.²⁷

The 1979 amendments made a number of changes in the calculation of excludable time. The two major changes in the excludable time provisions are the amendments to 18 U.S.C. § 3161(h)(1)(F) and to 18 U.S.C. § 3161(h)(8)(B). The first amendment deems excludable all time from the filing of any pre-

21. For a discussion of the effect of the 1979 amendments upon the calculation of excludable time, see text accompanying notes 117-28 *infra*.

22. 18 U.S.C. § 3161(h) (Supp. III 1979).

23. *Id.*

24. *Id.* § 3161(h)(8)(A) (1976).

25. *Id.*

26. *Id.* § 3161(h)(8)(B) (1976 & Supp. III 1979). For a discussion of the types of delay envisioned by Congress to fall within the ends of justice exclusion, see H.R. REP. NO. 1508, *supra* note 4, at 39-41; Administrative Office of the United States Courts, Amended Guidelines to the Administration of the Speedy Trial Act of 1974, at 18-21 (1975); Administrative Office of the United States Courts, Amended Guidelines to the Administration of the Speedy Trial Act of 1974, at 22C-22G (1976).

27. 18 U.S.C. § 3161(h)(8)(C) (1976).

trial motion through the hearing or disposition of the motion.²⁸ The second amendment states that continuity of counsel for both the defendant and the government is a factor to be considered in determining whether the ends of justice require that a continuance be granted.²⁹ Minor changes were made in other subparagraphs of section 3161(h)(1),³⁰ and new paragraphs were added to cover deferral of prosecution under 28 U.S.C. § 2902,³¹ transportation of defendants,³² and consideration of proposed plea agreements.³³

The amended Act not only retains the sweeping escape clause found in the judicial emergency provision from the original Act,³⁴ but also gives the chief judge of the district court the authority to suspend the time limits of the Act for a period not to exceed thirty days if the need for such suspension is "of great urgency."³⁵ In certain circumstances the judicial council of the circuit is authorized to suspend the time limits for a period not to exceed one year.³⁶

Sanctions during the phase-in period were limited to releasing those persons being detained solely to await trial and to reviewing the conditions of release for defendants who were not tried within ninety days after being designated as "high risk."³⁷ After July 1, 1980, more severe sanctions became effective:³⁸ upon motion of the

28. Section 3161(h)(1)(F) provides that: "(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: (1) Any period of delay resulting from other proceedings concerning the defendant, included but not limited to . . . (F) delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" *Id.* § 3161(h)(1)(F) (Supp. III 1979).

29. Section 3161(h)(8)(B)(iv) provides that: "(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows: . . . (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." *Id.* § 3161(h)(8)(B)(iv).

30. Compare *id.* § 3161(h)(1)(E) (1976) with *id.* § 3161(h)(1)(F) (Supp. III 1979).

31. *Id.* § 3161(h)(1)(C) (Supp. III 1979).

32. *Id.* § 3161(h)(1)(H).

33. *Id.* § 3161(h)(1)(I).

34. "Judicial emergency" is the term used by the Act itself. *Id.* § 3174.

35. *Id.* § 3174(e).

36. *Id.* § 3174(b).

37. *Id.* § 3164.

38. *Id.* § 3163(c).

defendant, the court may dismiss the complaint, information, or indictment against the individual with or without prejudice.³⁹ The defendant's failure to move for dismissal prior to trial or plea constitutes a waiver of his or her right to a dismissal.⁴⁰ Moreover, sanctions are provided against attorneys who intentionally delay the proceedings.⁴¹

The planning provisions of the Act are of paramount importance. The Act, as it became law in 1975, assumed that its substantive provisions were workable, but gave the district courts a five-year period in which to comment on the substantive provisions and to determine the resources needed to comply with the mandated time limits.⁴² The House Report emphasized this aspect of the law when it stated:

The heart of the speedy trial concept . . . is the planning process. These provisions recognize the fact that the Congress—by merely imposing uniform time limits for the disposition of criminal cases, without providing the mechanism for increasing the resources of the courts and helping to initiate criminal justice reform which would increase the efficiency of the system—is making a hollow promise out of the Sixth Amendment.⁴³

Similar characterizations of the Act can be found in the Senate Report,⁴⁴ the House hearings,⁴⁵ the House debate,⁴⁶ and the Senate

39. *Id.* § 3162(a)(1) (1976).

40. *Id.* § 3162(a)(2).

41. Sanctions are detailed in § 3162(b): "In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows: (A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006 of this title in an amount not to exceed 25 per centum thereof; (B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant; (C) by imposing on any attorney for the Government a fine of not to exceed \$250; (D) by denying any such counsel or attorney of the Government the right to practice before the court considering such case for a period of not to exceed 90 days; or (E) by filing a report with an appropriate disciplinary committee. The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court." *Id.* § 3162(b).

42. See notes 5, 18 & accompanying text *supra*.

43. H.R. REP. NO. 1508, *supra* note 4, at 23.

44. "The overall function of S. 754 is to encourage the Federal criminal justice system

debate.⁴⁷ The planning process of the Act thus makes it unique in the annals of criminal justice legislation. The bypass of the planning process evidenced by the amendments has created a potential nightmare for the federal courts and may eviscerate the utility of the Act.

Amendments to the Act

The 1979 amendments to the Speedy Trial Act contain three major provisions:⁴⁸ (1) a thirty-day minimum period to trial from the date on which the defendant first appears in answer to a charge;⁴⁹ (2) the exclusion, for the purposes of the mandated time limits, of all time from the filing of a motion through the disposi-

to engage in comprehensive planning and budgeting toward the goal of achieving speedy trial. The most widely known section of the bill is the first section which imposes the time limits. However, the most important sections of the bill are the planning process sections (sections 3165-69) which provide a planning process whereby each district court formulates a plan for the implementation of speedy trial and sets out the additional resources necessary to meet the limits of section 3161. . . . The planning process sections are critical to the bill's success because they provide the vital link between the Federal criminal justice system and the appropriations process. In summary they provide the courts and the United States Attorneys with a mechanism to plan for the implementation of 90-day trials in a systematic manner, to try innovative techniques on a pilot basis, to itemize the additional resources necessary to achieve the 90-day trial goal, and to communicate with Congress concerning its plans and the additional budget requests." S. REP. NO. 93-1021, 93d Cong., 2d Sess. 45 (1974).

45. In the House hearings on the Act, Senator Ervin commented: "I believe, after years of studying this problem, that S. 754 can begin to end this seemingly hopeless morass. The bill is based upon the premise that the courts, undermanned, starved for funds, and utilizing 18th century management techniques, simply cannot cope with burgeoning caseloads. The consequence is delay and plea bargaining. The solution is to create initiative within the system to utilize modern management techniques and to provide additional resources to the courts where careful planning so indicates." *Speedy Trial Act of 1974: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 & H.R. 4807, 93d Cong., 2d Sess. 158 (1974).*

46. In the House debate Representative Cohen stated, "[t]he most important provisions of this bill concern the process by which the district courts shall study the problems of pretrial delay and plan for the implementation of the act's time limits." 120 CONG. REC. 41, 775 (1974).

47. See, e.g., *id.* at 24,660.

48. Other amendments include: merger of the second and third intervals providing for a single 70-day period from indictment to trial, 18 U.S.C. § 3161(c)(1) (Supp. III 1979); changes in the factors for the ends of justice continuances, *id.* § 3161(h)(8); minor changes regarding high risk defendants, *id.* § 3164(a)-(b); and changes in the judicial emergency provisions, *id.* § 3174. See text accompanying note 28 *supra*.

49. 18 U.S.C. § 3161(c)(2) (Supp. III 1979).

tion of the motion;⁵⁰ and (3) the delay from July 1, 1979, to July 1, 1980, of the imposition of sanctions for delay.⁵¹ The sanctions of the Speedy Trial Act of 1974 were to become fully effective on July 1, 1979. Both the House and Senate Judiciary Committees, however, were under strong pressure from the Department of Justice⁵² and the American Bar Association⁵³ (ABA) to delay the implementation of sanctions or at least to alter the Act significantly. The Judicial Conference of the United States Courts also proposed some modifications of the original provisions of the Act.⁵⁴ Despite this pressure, the Senate did not hold hearings until May 2, 1977,⁵⁵ and the House waited until June 28, 1979.⁵⁶ Both Committees knew that unless they acted immediately the sanctions of the Act would become fully effective.⁵⁷ Congress responded to this pressure by passing a hasty and ill-conceived set of amendments to the Speedy Trial Act.

The fundamental purpose of the planning provisions of the Act was to assure that amendments would be considered judiciously during the four year phase-in period. The purpose of the long phase-in period was to establish the local federal district courts as the primary initiators of change. The planning provisions constitute imaginative legislation and the poorly drafted amendments reemphasize the invaluable contribution these novel provisions could have made in effectuating the Act's purpose in guaranteeing the right to a speedy trial.

Thirty-Day Minimum to Trial

In an apparent attempt to guarantee that the Act did not become the "Speedy Convictions Act,"⁵⁸ the Justice Department,⁵⁹

50. *Id.* § 3161(h)(1)(F).

51. *Id.* § 3163(c).

52. *See Senate Hearings 1979, supra* note 11, at 31 (statement of Assistant United States Attorney General Philip B. Heyman).

53. *See id.* at 482-509.

54. *See id.* at 56-69 (statement of Judge Alexander Harvey II, Chairperson, Committee on Criminal Law of the Judicial Conference).

55. *See id.* at 16.

56. *See H.R. REP. No. 96-390, 96th Cong., 1st Sess. 6-7, reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 805, 810-11 [hereinafter cited as H.R. REP. No. 96-390].

57. 18 U.S.C. § 3163(c) (1976).

58. *See Senate Hearings 1979, supra* note 11, at 115 (statement of Salvatore R. Martoche).

59. The Justice Department was the author of S. 961, 96th Cong., 1st Sess. (1979), *reprinted in Senate Hearings 1979, supra* note 11, at 4-8.

the Judicial Conference,⁶⁰ and the ABA⁶¹ all urged a waivable minimum time limit before which a defendant could not be tried. The avowed reason for this amendment was to ensure that a defendant has adequate time for pretrial preparation.⁶² Lurking in the background of this amendment, however, was the underlying sentiment of the private criminal defense bar that its attorneys needed a determinate period of time before trial so that their clients could make arrangements to pay legal fees.⁶³

The minimum time to trial concept is found in amendments to section 3161(c)(2): "Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se."⁶⁴ Although this clause seems straightforward, in the rush to pass the amendments Congress left unanswered a crucial question as to whether the excludable time provisions of section 3161(h) apply to the thirty-day period or whether the thirty-day period is measured simply in calendar days.

The administrative burden in monitoring the time limits imposed by the Act would be greatly increased if excludable time is applicable to the thirty-day minimum to trial provision.⁶⁵ A more

60. The Judicial Conference was the author of S. 1028, 96th Cong., 1st Sess. (1979), reprinted in *Senate Hearings* 1979, *supra* note 11, at 9-15.

61. *Senate Hearings* 1979, *supra* note 11, at 486-95.

62. See, e.g., *id.* at 91 (statement of Professor Daniel J. Freed); *id.* at 115 (statement of Salvatore R. Martoche).

63. See *id.* at 491 (American Bar Association memorandum).

64. 18 U.S.C. § 3161(c)(2) (Supp. III 1979).

65. One of the most beneficial results of the Act has been the improvement in court calendar management by the clerks. See Mann, *The Speedy Trial Act Planning Process*, in *Senate Hearings* 1979, *supra* note 11, at 628. Innovations such as computer docketing have made the courts more efficient. See, e.g., United States District Court for the District of Arizona, Plan for Prompt Disposition of Criminal Cases, Section IV (1980). The clerks have centered their management responsibilities around keeping the judges informed of the latest date a defendant can be tried. *Id.* The process of continually updating 400-500 pending criminal cases to guarantee that no case exceeds a time limit, while still allowing for civil cases to be scheduled and tried, presents a significant logistical problem for the clerks. If excludable time is applicable to the thirty-day minimum to trial provision the clerk has an additional burden; the clerk would not only have to monitor for maximum time limits, but for minimum time limits as well. To further complicate the problem, the thirty-day minimum period is determined from a different starting time than that for the running of time from arrest to indictment or indictment to trial. The time to indictment is measured from the date on which an individual was arrested or served with a summons in connection with the charge. 18 U.S.C. § 3161(b) (1976). The time to trial is measured from the date that the information or indictment is filed and made public, or from the date the defendant has

significant practical problem can arise with respect to whether hearings on motions and trials can be scheduled closely together so that the prosecution can avoid the expense and inconvenience of requiring out-of-town witnesses to make multiple trips in order to testify at both the hearings and the trial. Such circumstances are illustrated in the following hypothetical. Suppose the defendant makes his or her first appearance on a drug charge on March 1. On March 3 counsel files a motion to suppress certain evidence. Trial is set for April 1 and the hearing on the motion to suppress is set for March 30. The suppression hearing and the trial are set close together in order that out-of-town witnesses can conveniently testify at both the hearing and the trial. Defendant's motion to suppress is denied. If excludable time is applicable to section 3161(c)(2), the time from the filing of the motion until the suppression hearing is excludable under section 3161(h)(1)(f). Because the defendant cannot be forced to trial before April 29, the defendant has a new advantage with which to negotiate—the expense and inconvenience of the witnesses' second trip.

A careful examination of the legislative history of the thirty-day minimum to trial amendment is ambiguous as to the applicability of excludable time. The question probably would not have arisen had the amendments either been generated at the district court level and forwarded to Congress or if the proposed amendments had been circulated to the district court planning groups for comment. Congress violated the spirit of the planning provisions and complicated the Act needlessly when it bypassed the local planning groups in enacting the 1979 amendments. The very recognition that practical problems could not be anticipated by Congress led to the inclusion of planning provisions in the original Act.⁶⁶ The failure to use the planning provisions will exacerbate administrative difficulties and encourage litigation. To fathom whether excludable time applies to the thirty-day minimum to trial period, cumbersome analysis cannot be avoided. To determine the applicability of the excludable time provisions of section 3161(h) to the thirty-day minimum to trial period, the following analysis thus will consider the statutory language, the legislative

appeared before the court on the pending charge, whichever date last occurs. *Id.* § 3161(c)(1) (Supp. III 1979). The thirty-day minimum period runs from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se. *Id.* § 3161(c)(2).

66. See text accompanying note 43 *supra*.

history, the noncongressional sources of the legislation, and finally the policy underlying the provisions.

Analysis of the Statutory Language

The Act, as amended, does not explicitly declare whether excludable time is applicable to the thirty-day minimum to trial period.⁶⁷ Yet sections 3161(d)⁶⁸ and 3161(e),⁶⁹ both amended in 1979, directly refer to the applicability of excludable time. Both sections conclude with the language: "The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section."⁷⁰ Moreover, the thirty-day minimum to trial provision contained in section 3161(c)(2) is the only major provision within section 3161 to which excludable time has not been made explicitly applicable either through the clause in section 3161(h) or through a precise statement of applicability as in

67. 18 U.S.C. § 3161(c)(2) (Supp. III 1979). See note 64 & accompanying text *supra*.

68. 18 U.S.C. § 3161(d) (Supp. III 1979) states: "If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsection (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be. (2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection." *Id.* § 3161(d).

69. Section 3161(e) states: "If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection." *Id.* § 3161(e).

70. See notes 68-69 *supra*.

section 3161(d) or section 3161(e).⁷¹

Section 3161(b)⁷² of the original Act and amended section 3161(c)(1),⁷³ however, are not expressly limited by the excludable time provisions, although excludable time applies to them through the clause in section 3161(h). Hence section 3161(c)(2) is unclear as to the applicability of excludable time, and other provisions of the Act must be examined.

On their face, the provisions of the Act that prescribe sanctions favor a conclusion that excludable time does apply to the thirty-day minimum to trial period. Section 3162 creates sanctions "[i]f a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h)."⁷⁴ This arguably implies that excludable time is applicable to all time limits contained in section 3161. Section 3161(e) also may be read to imply that excludable time applies to the thirty-day minimum to trial period. Subsection (e) is the last provision within section 3161 that concerns the final 1980 time limits; the 1979 amendments appended the following provisions to it: "The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection."⁷⁵ This language suggests that the excludable time provision found in section 3161(h) was intended to apply to all of section 3161. The legislative history, however, only compounds the ambiguity of what the term "subsection" refers to, and leads to no firm conclusion.⁷⁶

71. 18 U.S.C. § 3161 (Supp. III 1979).

72. Section 3161(b) states: "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days." *Id.* § 3161(b) (1976).

73. Section 3161(c)(1) states: "In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent." *Id.* § 3161(c) (Supp. III 1979).

74. *Id.* § 3162(h) (1976).

75. *Id.* § 3161(e) (Supp. III 1979).

76. The most cogent reason for the appearance of the word "subsection" as opposed to "section" seems to relate to S. 961, 96th Cong., 1st Sess. (1979), reprinted in *Senate Hearings* 1979, *supra* note 11, at 4-8. See text accompanying note 66 *supra*. The amendments are

The sanction provisions seem to be aimed largely, if not exclusively, at the trial that is proceeding too slowly. For example, the primary sanction for failing to bring a defendant to trial within the seventy-day limit is found in section 3162(a)(2):

If a defendant is not brought to trial within the time limit . . . the information or indictment shall be dismissed on motion of the defendant In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.⁷⁷

The source of the original Act's sanctions provision is found in the case law predating the Act.⁷⁸ The cases involving speedy trial issues⁷⁹ were all concerned with trials being conducted long after the defendant's arrest. Trials conducted so swiftly as to preclude adequate preparation were not viewed as a speedy trial issue but rather as a question of whether the defendant had been accorded his or her right to effective assistance of counsel.⁸⁰ It is not surprising, therefore, that the sanction provisions of the Act were only framed in terms of those cases that took too long to proceed to trial.

The attorney sanctions of section 3162 offer similar guidance. The sanctions for attorneys are imposed when an attorney sets a case for trial knowing that a witness is unavailable, files a motion solely for purposes of delay, makes a false statement to gain a continuance, or fails to proceed to trial.⁸¹ The obvious intent of the

very confusing in determining whether the word "section" is referring to the section of the original Act or to a section of the bill to amend the Act. For example, § 4 of S. 961 amends § 3161(e) of the Act. The ambiguity arises as to whether the word "section" in the statement of S. 961, "[t]he sanctions of section 3162 are applicable to this section," *id.* § 4, means § 4 of S. 961 or § 3161(e) of the original Act. 18 U.S.C. § 3161(e) (1976). It may very well be that a congressional staff member tried and failed to clear up this ambiguity.

77. 18 U.S.C. § 3162(a)(2) (1976).

78. See, e.g., Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975). For a detailed summary of the case law subsequent to *Barker v. Wingo*, 407 U.S. 514 (1972), see Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L.F. 11 (1975).

79. See, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972).

80. See *Avery v. Alabama*, 308 U.S. 444 (1940). See also Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 4.1 (1971).

81. 18 U.S.C. § 3162(b) (1976).

section is to prevent delay. The attorney sanctions, just as the dismissal sanction, were not drafted to accommodate the trial that is moving too swiftly. Although it might reasonably be argued that the sanctions of section 3162(a)(2) operate whenever "a defendant is not brought to trial within the time limit required by section 3161(c) as extended by 3161(h),"⁸² it is clear from the wording of the sanction provisions, and from their legislative history,⁸³ that they are inappropriate when directed at the trial that is running too swiftly. The applicability of excludable time to the thirty-day minimum period thus cannot be determined by reference either to the provision establishing the thirty-day minimum or to the provisions regarding sanctions. Consequently, the legislative history must be examined.

Analysis of the Legislative History

The Senate hearings⁸⁴ and the House⁸⁵ and Senate reports⁸⁶ on the amendments contain little discussion of the thirty-day minimum to trial period. The sparse information in the Senate Report, however, does address the issue directly:

Prohibiting trial less than 30 days after the date the defendant appears in a position to begin preparing his defense more fully protects basic due process rights. It is the Committee's intent that the exclusions provided in section 3161(h) apply to the 30-day minimum to trial provision. Therefore, if an event occurs which would automatically exclude time under subsection (h), such as a pretrial mental examination, that time is not only excluded from computing the time within which trial must occur prior to imposition of the dismissal sanctions, but time would also automatically be excluded in computing the 30-day minimum period of time, during which the judge could not schedule trial without the defendant's consent.⁸⁷

82. *Id.* § 3162(a)(2).

83. H.R. REP. No. 1508, *supra* note 4, at 36-37.

84. *Senate Hearings* 1979, *supra* note 11.

85. H.R. REP. No. 96-390, *supra* note 56.

86. S. REP. No. 96-212, 96th Cong., 1st Sess. (1979).

87. *Id.* at 32. "Having said that, the Committee wishes to stress that this minimum-preparation time guarantee is not to be construed to permit the defendant to delay unduly the trial date, especially where permissible excludable delay is found. If, for example, counsel for the defedant [sic] moves for an "ends of justice" continuance under section 3161(h)(8) to allow him or her additional time to prepare for trial, the court should scrutinize closely his or her good-faith efforts to prepare inside the time fixed for trial, taking into account other excludable delays. Again, the court should take great care to balance the de-

This statement stands alone in the Senate Report; no similar remarks appear in the Senate hearings,⁸⁸ the House Report,⁸⁹ or in the floor debates of either the House⁹⁰ or the Senate.⁹¹ These omissions cast doubt upon the authority of the statement in the Senate Report. Resort to noncongressional sources does not alleviate the confusion.

Analysis of the Noncongressional Sources

In November of 1978 the Second Circuit's Proposed Guidelines under the Speedy Trial Act⁹² were published.⁹³ Through its proposed guidelines, the Second Circuit attempted to create a set of standards for interpreting the Act "that both satisfies the purposes of the Act and takes into account the legitimate needs of the parties for counsel of their choice, reasonable notice of trial and reasonable time to prepare for trial."⁹⁴ To further these goals the proposed guidelines stated:

[W]henever the time between arraignment and the scheduled trial date, *exclusive of excluded time*, does not exceed thirty (30) days, the Court shall (a) view a request for an adjournment of trial to a date within the sixty (60) day statutory limit, liberally and (b) where such a request is denied, set forth its reasons for finding that the denial of the adjournment does not interfere with the defendant's or Government's choice of counsel, the defendant's ability to prepare for trial without undue pressure, or the Government's ability to diligently prepare for trial.⁹⁵

However, the guidelines as ultimately approved by the Judicial Council of the Second Circuit on January 16, 1979, read: "when-ever the time between arraignment and the scheduled trial date does not exceed thirty (30) days,"⁹⁶ omitting the phrase "exclusive

defendant's and society's speedy trial rights against the "ends of justice" to be served by granting such a motion." *Id.*

88. *Senate Hearings* 1979, *supra* note 11.

89. H.R. REP. NO. 96-390, *supra* note 56.

90. 125 CONG. REC. H 6,911-16 (daily ed. July 31, 1979).

91. *Id.* at S 8,009-26 (daily ed. June 19, 1979).

92. Judicial Council Speedy Trial Act Coordinating Committee of the Second Circuit, Proposed Guidelines Under the Speedy Trial Act (Nov. 20, 1978).

93. *Senate Hearings* 1979, *supra* note 11, at 91 (statement of Professor Freed).

94. Judicial Council Speedy Trial Act Coordinating Committee of the Second Circuit, Proposed Guidelines under the Speedy Trial Act (Nov. 20, 1978).

95. *Id.* at 2 (emphasis added).

96. Judicial Council of the Second Circuit, Judicial Council Speedy Trial Act Coordinating Committee, Second Circuit Speedy Trial Act Guidelines (Jan. 16, 1979), *reprinted in*

of excluded time."

It might be inferred from the deletion of the phrase "exclusive of excludable time" from the proposed guidelines that excludable time would apply under the final guidelines. This understanding might then be attributed to the drafters of the Justice Department⁹⁷ and Judicial Conference Bills,⁹⁸ but with little justification. The issue of excludable time and its effect upon the thirty-day period were of minimal importance in the Second Circuit, so the legislature would probably not rely upon that Circuit's guidelines.⁹⁹

Additional noncongressional sources of information concerning the applicability of the excludable time provisions to the thirty-day minimum to trial period are the interpretations of the Act published by the Administrative Office of the United States Courts and sent to all the districts. The Act empowers the Administrative Office to assist the districts in implementing the Act.¹⁰⁰ Unfortunately, the Administrative Office has taken conflicting positions on the applicability of section 3161(h) to the thirty-day minimum to trial provision in section 3161(c)(2). In Issuance Number 28, dated August 3, 1979, the Administrative Office stated without comment that "[t]he report of the Senate committee indicates that the exclusions are to be applied in calculating the thirty-day period."¹⁰¹ Issuance Number 30, however, states that the thirty-day minimum is *not* extended by the exclusions of section 3161(h).¹⁰² Although it

Senate Hearings 1979, *supra* note 11, at 392-93.

97. See S. 961, 96th Cong., 1st Sess. (1979), reprinted in *Senate Hearings* 1979, *supra* note 11, at 4-8.

98. See S. 1028, 96th Cong., 1st Sess. (1979), reprinted in *Senate Hearings* 1979, *supra* note 11, at 9-15.

99. The trial judges of the districts within the Second Circuit could move quickly to trial within 30 days from arraignment, whether it was 30 calendar days or 30 days excluding time concerned in § 3161(h), if the trial judge had good reason to move ahead so rapidly. In fact with the congestion in most courts, it was highly unlikely that there was a problem of moving to trial too quickly. For the statistics on the caseload, time to indictment, and time to trial for the district courts of the Second Circuit, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *FOURTH REPORT ON THE IMPLEMENTATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974*, at A-3 to A-4, B-3 to B-4, C-3 to C-4 (June 28, 1979).

100. 18 U.S.C. §§ 3170-3171 (1976 & Supp. III 1979).

101. Administrative Office of the United States Courts, Issuance No. 28, at 2 (August 3, 1979).

102. "In spite of language to the contrary in the report of the Senate Judiciary Committee on the 1979 amendments (S. Rept. 96-212, p. 32 (1979)), it is the view of this Committee that the thirty-day minimum period for commencement of trial is not extended by the exclusions of Section 3161(h). Section 3161(h) applies by its terms to 'computing the time within which the trial of any such offense *must* commence,' language that is not easily

might be argued that the earlier issuance by the Administrative Office was merely an early warning to the district courts and was not intended to be interpretative, at the very least it can be said that those close to the legislative process were not clear as to what was intended and did not contradict the Senate Report.¹⁰³ If the problem's solution had been the source of any publicity or consideration, such reference would have been placed within the earlier issuance.

Finally, it should be noted that the Senate relied upon the ABA for guidance in amending the Act.¹⁰⁴ The ABA Section on Criminal Justice reported to the ABA Board of Governors a number of recommended amendments to the Act.¹⁰⁵ Among these proposed amendments was one recommending that "trial of a defendant shall not commence within 30 days of the filing of an indictment or information without the defendant's consent."¹⁰⁶ However, no references were made in the ABA Report to the applicability of excludable time to the thirty-day period.

The Act itself and the legislative history of the amendments thus do not supply an answer to the question of whether the excludable time provisions of section 3161(h) apply to the thirty-day minimum to trial period of section 3161(c)(2). The avowed policy underlying the thirty-day period amendment does not make the issue any less problematic.

read as governing the determination of the period during which trial may *not* commence. The 1979 amendments specifically provided in Sections 3161(d)(2) and (e) that the exclusions applied to those provisions, but no similar provision is found in Section 3161(c)(2). Moreover, if the thirty-day minimum were interpreted as subject to the exclusions, the provision would become a powerful weapon for defendants who wanted to delay their prosecutions, a result that is wholly at odds with the major purpose of the statute. Under such an interpretation, the court could be compelled to defer a trial simply because the defendant filed a motion or because the court took a pretrial matter under advisement—both events that trigger periods of excludable time under Section 3161(h)(1)." Administrative Office of the United States Courts, Guidelines to the Administration of the Speedy Trial Act of 1974, Issuance No. 30, at 12-13 (December 14, 1979).

103. At both the Senate and House hearings, Mr. Anthony Partridge of the Federal Judicial Center and Mr. Norbert Halloran of the Administrative Office were present. Their presence at the Senate Hearings is documented in *Senate Hearings 1979*, *supra* note 11, at 56. Their presence at the House Hearings was noted by the author, who appeared as a witness. See H.R. REP. No. 96-390, *supra* note 56, at 7.

104. For a statement of the ABA's recommendations, see *Senate Hearings 1979*, *supra* note 11, at 482-509.

105. *Id.* at 486-95.

106. *Id.* at 492.

Analysis of the Policy Underlying the Amendment

The stated purpose of the thirty-day minimum to trial period is to guarantee that the defendant has adequate time to prepare before trial.¹⁰⁷ Had the thirty-day proposal been circulated to the district court planning groups for comment, the districts would almost certainly have responded that there was no need for such a provision. The experience of the district court planning groups would have indicated that present court calendars generally are so severely crowded that the actual danger is in the cases that take too long before they are tried. The planning groups probably would have responded that if a case ever arose in which the Government or the court was pushing for an extremely swift trial, the defendant's sixth amendment rights to adequate representation¹⁰⁸ and the statutory ends of justice exclusion¹⁰⁹ would adequately protect the defendant.

The thirty-day minimum to trial provision is a solution to an imaginary problem; discerning how the policy of preventing hasty trials should affect specific determinations therefore requires speculation. Although the applicability of the excludable time provisions to the thirty-day minimum to trial period might appear to further the policies underlying the amendment, the opposite conclusion is also plausible.

The argument that excludable time should not apply to the thirty-day period centers on the premise that thirty calendar days sufficiently guarantees that a defendant is not being "railroaded" to trial.¹¹⁰ The logic underlying this argument can be questioned, however, by hypothesizing a situation in which the defendant is sent out of the district for psychiatric testing, thereby being separated from his or her lawyer, for twenty-eight days. A rule of thirty calendar days would not sufficiently guarantee that the lawyer would be adequately prepared for trial. If the thirty-day period excluded the psychiatric examination time under section 3161(h)(1)(A),¹¹¹ however, the lawyer would have another twenty-eight days, not two days, to prepare for trial. If, for example, a lawyer spent three weeks preparing a motion for a change of venue

107. See notes 58-62 & accompanying text *supra*.

108. See note 80 *supra*.

109. 18 U.S.C. § 3161(h)(8) (1976 & Supp. III 1979).

110. See notes 58-62 & accompanying text *supra*.

111. 18 U.S.C. § 3161(h)(1)(A) (Supp. III 1979).

based on pretrial publicity, a rule of thirty calendar days would give the lawyer only nine days to prepare for a trial on the merits. If the three weeks were excludable time under section 3161(h)(1)(F),¹¹² however, the lawyer would have a full thirty days of preparation time. On the other hand, the ends of justice exclusion¹¹³ coupled with the independent sixth amendment right to adequate representation by counsel¹¹⁴ would guarantee sufficient preparation time in these situations. If counsel can rely upon the ends of justice provision in these instances, section 3161(c)(2) would appear unnecessary. The policy analysis aids little in resolving the question.

This Article concludes that the excludable time provisions should be inapplicable to section 3161(c)(2). The Act does not explicitly require the application of excludable time.¹¹⁵ Other than the conclusory statement found only in the Senate Report,¹¹⁶ there is no legislative history to support the application of the excludable time provisions. The thirty-day minimum to trial provision created a problem where none existed; appending excludable time to the thirty-day minimum would merely create additional complications. If section 3161(h) is held inapplicable to section 3161(c)(2), the practical error foisted on the courts by Congress would be minimized.

Excludable Time for Motions

The legislative history of the original Act demonstrates Congress' recognition that the public interest in quickly trying criminal defendants is often not protected by the participants in the criminal justice system.¹¹⁷ As Senator Ervin noted in his testimony before the House Judiciary Committee:

There is no question in my mind that speedy trial will never be a reality until Congress makes clear to all that it will no longer tolerate delay. Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The court, defendant, his at-

112. *Id.* § 3161(h)(1)(F).

113. *Id.* § 3161(h)(8) (1976 & Supp. III 1979).

114. See note 80 *supra*.

115. 18 U.S.C. § 3161(c)(2) (Supp. III 1979).

116. See note 87 & accompanying text *supra*.

117. See S. REP. No. 93-1021, 93d Cong., 2d Sess. 9 (1974). See also *Senate Hearings* 1979, *supra* note 11, at 2.

torney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The overworked courts, prosecutors, and defense attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial, because he wishes to delay his day of reckoning as long as possible.¹¹⁸

This understanding of the competing interests surrounding the legislative efforts to ensure the right to a speedy trial prompted Congress to list those events that were acceptable reasons to delay trial.¹¹⁹ The only major discretionary delay allowed was that necessary to promote the ends of justice.¹²⁰ Even this delay, however, required the court to state on the record its reasons why the ends of justice were served by granting the delay and the court was compelled to consider certain factors set forth in the Act in its reasoning.¹²¹ The Act also stated explicitly that "[n]o continuance . . . shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."¹²²

Despite this background, the 1979 amendments adopted by Congress create a loophole that seriously undermines the Act's purpose and, as a practical matter, could leave the setting of trial times to the whims of the court, the prosecution, or the defense counsel. The 1979 amendments, in contrast to the original Act, require that "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion"¹²³ shall be excluded in computing the time in which an information or indictment must be filed or in which a trial must begin. The amended Act also retains the following related provision regarding exclusion of time during the period the motion is under advisement: "[d]elay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advise-

118. *Speedy Trial Act of 1974: Hearings Before Subcomm. on Crime of the House Comm. on the Judiciary on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 773 & H.R. 4807, 93d Cong., 2d Sess. 158 (1974).*

119. *See* 18 U.S.C. § 3161(h) (1976).

120. *Id.* § 3161(h)(8).

121. *Id.*

122. *Id.*

123. *Id.* § 3161(h)(1)(F) (Supp. III 1979).

ment by the court [is excludable time]."¹²⁴ By joining these two provisions, the Government or defense counsel may file motions that toll the time, or the judge may take virtually any amount of time in setting the motion for hearing or for taking the motion under advisement. The only limitation on the judge is that the hearing or disposition of the motion must be "prompt."¹²⁵ The discretionary aspect of "promptness" returns to the criminal process the type of discretion Congress originally intended to limit in the Act.

To ameliorate this situation, a time limit could be set on "promptness" by defining time limits for setting hearings on criminal motions in the local speedy trial plan.¹²⁶ In addition, the circuits could formulate guidelines to solve this problem, pursuant to the new provisions of section 3166(f): "Each plan may be accompanied by guidelines promulgated by the judicial council of the circuit for use by all district courts within that circuit to implement and secure compliance with this chapter."¹²⁷ This provision was included as a result of the praise received by the Second Circuit guidelines in congressional hearings. Other circuits, however, have apparently decided not to follow the Second Circuit's lead in promulgating circuit guidelines.¹²⁸ Because there is no indication that Congress consulted the district courts in making the time needed for motions excludable, it apparently again ignored the planning process, just as it had done in drafting the thirty-day minimum to trial provision. The final major amendment, delay of the sanctions for one year, shows this same neglect of the planning process.

Delay of Sanctions

The major criticism levied against the planning process was that its success depended upon whether the courts would act to hasten the criminal process although neither sanctions nor rewards

124. *Id.* § 3161(h)(1)(J).

125. *Id.* § 3161(h)(1)(F).

126. In the Ninth Circuit at least, no district courts have taken this approach. Telephone conversation with Richard Wieking, Assistant to the Circuit Executive for the Ninth Circuit (June 6, 1980).

127. 18 U.S.C. § 3166(f) (Supp. III 1979).

128. Telephone conversation with Richard Wieking, Assistant to the Circuit Executive for the Ninth Circuit (June 6, 1980).

were provided for doing so.¹²⁹ Consequently, in many districts during the phase-in period, judges were making few excludable time determinations because there were no penalties for failure to do so.¹³⁰ Speedy trial data, therefore, was always suspect because there could be no assumption that all of the available excludable time determinations were made and recorded by the court.¹³¹

The experience of many district courts contradicts the underlying premise for delaying the sanctions for one year—that the districts would be better prepared at a later date for full implementation of the Act. When sanctions are not in force, many courts will refuse to make excludable time determinations. Congress received this advice during the hearings,¹³² but ignored it. One witness before the House Subcommittee testified that delay could be justified, but only by the need for time to fill the additional judgeships authorized by the Omnibus Judgeship Act.¹³³ If there were to be a delay of the sanctions, the witness argued, it should be linked directly to the staffing of the new judgeships.¹³⁴ This approach was not followed.

Sanctions were delayed, contrary to the experience of the district court planning groups, because of the pressure exerted by those groups that in the past were opposed to any speedy trial legislation at all. A cynic would conclude that those groups wished to delay that which they could not suppress, hoping that at a subsequent time they could make the Act permanently disappear.¹³⁵

Conclusion

The 1979 amendments to the Speedy Trial Act will permit the very evils the Act originally sought to avoid and the amendments

129. See Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1, 15-27.

130. *Id.* See also *Senate Hearings 1979*, *supra* note 11, at 90-91.

131. See *Senate Hearings 1979*, *supra* note 11, at 90-91; Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1, 15-27.

132. See H.R. REP. NO. 96-390, *supra* note 56, at 8.

133. *Id.* at 7.

134. *Id.*

135. For a discussion of the reactions of the judges, the prosecutors, and defense counsel to the Act, see Misner, *Delay, Documentation and the Speedy Trial Act*, 70 J. CRIM. L. & C. 214 (1979).

are so confusing¹³⁶ that an outbreak of litigation concerning the interpretation and applicability of their terms is to be expected. The frailties of the amendments are the direct result of Congress' bypass of the planning process that it created in the original Act. Unless the local district court planning process is used, future amendments to the Act, and the Act itself, may well become ill-suited to the practical issues of case management facing the federal district courts.

136. The confusing nature of the amendments can be seen in the action taken by the local planning groups in drafting the local speedy trial plans. In the District of Arizona, the vote was unanimous not to have excludable time apply to the minimum 30-day period to trial. Letter from Robert L. Misner, Speedy Trial Reporter for the District of Arizona, to Judge Robert F. Peckham (Feb. 5, 1980) (on file with the *Hastings Law Journal*). In the Southern District of California, the vote was 7-2 not to have excludable time apply. Letter from Robert L. Misner, Speedy Trial Reporter for the Southern District of California, to Judge Robert F. Peckham (Feb. 5, 1980) (on file with the *Hastings Law Journal*). In the District of Oregon, the planning group divided evenly on the issue. Letter of Charles W. Carnese, Speedy Trial Reporter for the District of Oregon, to Richard Wieking (Mar. 21, 1980) (on file with the *Hastings Law Journal*).

